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OFFICE OF THE SECRETARY

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SUSAN H. ROSENAU
ADMITTED IN D.C. ONLY

May 5, 1993

By Hand

Donna R. Searcy

Secretary

Federal Communications Commission

Washington, D.C. 20554

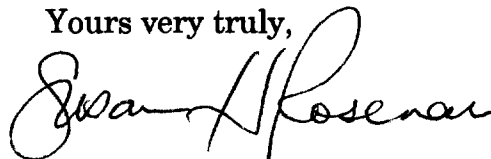
RE: MM Docket No. 93-42, Calistoga, California

Dear Ms. Searcy:

On behalf of Moonbeam, Inc., an applicant (File No. BPH-911115MG) for a New FM Station on Channel 265A in Calistoga, California, please find the original and six copies of its Opposition to Petition to Enlarge in the above-referenced proceeding.

Kindly communicate any questions directly to this office.

Yours very truly,



Susan H. Rosenau

Enclosures (6)

cc: Moonbeam, Inc.
Larry Miller, Esquire
A. Wray Fitch, Esquire
Administrative Law Judge Edward Luton

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Before The

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Washington, D.C. 20554

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- To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. Pursuant to Section 1.229, motions to enlarge the issues in a comparative broadcast proceeding are to be filed by thirty ("30") days after the release of the Hearing Designation Order. The filing period for such motions expired on April 7, 1993.

4. On April 21, 1993, Willson filed and served on Moonbeam a Petition to Enlarge Issues ("Pet."), seeking the addition of misrepresentation/lack of candor issues on the basis of the following evidence:

- A statement by Moonbeam principal Mary F. Constant in her March, 1992 Integration Statement that she had attended a university within the 1 mV/m contour of Moonbeam's proposed statement, alleged to be false because the university's campus is purportedly 6-7 km (x miles) outside the proposed contour (Pet. at 2; Declaration of Mel Freedman, attached to the Petition to Enlarge Issues as Exhibit 3, dated April 20, 1993 ("Freedman Dec.")); and

- The hearsay statements of three people who purportedly answered the phone of James Warren & Sons Realtors and denied that Ms. Constant was, as claimed in her March, 1992 Integration Statement, employed there (Pet at 3; Declaration of Matthew Horner, attached to the Petition to Enlarge Issues as Exhibit 5, dated April 12, 1993 ("Horner Dec."); Declaration of Carol Bedi, attached to the Petition to Enlarge Issues as Exhibit 5, dated April 9, 1993 ("Bedi Dec."); Declaration of Gary E. Willson, attached to the Petition to Enlarge Issues as Exhibit 6, dated April 13, 1993 ("Willson Dec.")).

5. As shown below, Willson's petition should be dismissed as untimely. Further, Willson's petition is supported by wholly incompetent evidence and fails to raise a substantial and material issue of fact, and should for those further reasons be dismissed and/or denied.

ARGUMENT

I. WILLSON'S PETITION SHOULD BE DISMISSED AS UNTIMELY

6 Willson's petition was not filed until April 21, 1993, long past

service, and because “no judging process could operate efficiently or accurately if an applicant is allowed to sit back and hope for a decision in its favor and to parry with an offer of more evidence when faced with an adverse decision.” *Id.* at 4333, *citing Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

9. Section 1.229 provides that untimely petitions to enlarge issues will be considered only if the petitioner shows “good cause” for the tardiness, or if the petition raises an issue of “probable decisional significance” AND “such substantial public interest importance as to warrant consideration in spite of its untimely filing.” 47 C.F.R. 1.229(c); *Great Lakes, supra*, at 4332. To establish “probable decisional significance,” Willson must establish that the “likelihood of proving the . . . allegations . . . is so substantial as to outweigh the public interest benefits inherent in the orderly and fair administration of the Commission’s business.” *Id.* Willson has not even attempted such a showing. Because as set forth in Parts II and III, *infra*, his evidence is incompetent and has been refuted by competent evidence, Willson is unable to make such a showing under any circumstances.¹

¹Moonbeam notes Willson’s reference to *San Joaquin Television Improvement Corporation*, 2 FCC Rcd 7004 (1987), in which the Commission accepted an untimely petition to add a misrepresentation issue. *San Joaquin* is wholly distinguishable. Serious public interest concerns were raised by judicially noticeable evidence of judgments against principals of the applicant and related fraudulent activities investigated by the SEC. The misrepresentations regarding three years of former employment in that matter involved *both* the claimed broadcast experience of the applicant’s principal, *and* concealment of past illegal and fraudulent conduct in dealing with the public. This situation is not at all comparable.

10. The Commission routinely rejects much more credible excuses
for tardiness than Willson has offered. For example, in *Abacoa Radio*

II. WILLSON'S EVIDENCE IS INCOMPETENT

13. Section 1.229(d) requires that an enlargement petition must be based on specific allegations of fact which are supported by "affidavits of a person or persons having personal knowledge thereof." 47 C.F.R.

1.229(d). None of Willson's declarants have personal knowledge of Ms. Constant's association with James Warren & Sons or of her status with the California Department of Real Estate; in fact, only *one* of the declarations -- the Bedi Declaration -- even *identifies* the speaker of the proffered hearsay.

14. An enlargement petition supported only by hearsay must be dismissed. *E.H. "Pepper" Schultz*, 46 RR 2d 1441, 1443 (ALJ, January 17, 1980) (rejecting petition to add site availability issue based on telephone conversation with personnel of town planning department). *See also Dena Pictures, Incorporated*, 98 FCC 2d 675, 686, *recon. denied*, 98 FCC 2d 670 (Rev. Bd. 1984) (enlargement petition based on newspaper article rejected on hearsay grounds).

15. The requirement of personal knowledge is especially strictly enforced when the enlargement petition alleges misrepresentation. As stated by the Commission in *Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172 (Rev. Bd. 1981), a petition to add a misrepresentation issue based on two affidavits reciting hearsay must be dismissed because

The proponent of a misrepresentation issue has the burden of coming forward with a *prima facie* showing, in accordance with Section 1.229 of the Rules. Section 1.229(d) requires that motions to enlarge issues must be supported by affidavits of a person or persons having personal knowledge of the allegations of fact. *This is particularly germane with respect to allegations of misrepresentation. Speculation and innuendo will not suffice.*

86 FCC 2d at 1175-76 [footnotes omitted; emphasis supplied]; *see also Alabama Citizens for Responsive Public Television, Inc.*, 46 RR 2d 408, 412 (1979). The evidence submitted must be "of sufficient weight and reliability to raise a substantial question of misrepresentation,"² *id.* at 1176, which hearsay evidence is not. Accordingly, Willson's petition is wholly insufficient and should be dismissed.

III. WILLSON'S EVIDENCE LACKS SUBSTANCE

16. As set forth in the Declaration of Casey Escher submitted herewith, Mary Constant has in fact been an associate Realtor of James Warren & Sons in St. Helena since February, 1992, and her license is maintained in that office. *See Declaration of Casey Escher*, dated April 30, 1993, submitted herewith as Exhibit A.

17. With respect to the remaining allegations in Willson's petition, regarding the exact location of Sonoma State University, there can be no question that, at most, Ms. Constant inadvertently erred in her recollection of the school's exact location. *See Declaration of Mary Fairbanks Constant*, dated April 30, 1993, submitted herewith as Exhibit B. Such is not the stuff that misrepresentation issues are made of, and certainly cannot be viewed as credible evidence of a "pattern of evasiveness and false testimony" (Pet. at 4). The intent to misrepresent is an absolute prerequisite to the addition of a misrepresentation issue *Intercontinental Radio, Inc.*, 98 FCC 2d 608, 639 (Rev. Bd. 1984);

² *Garrett, Andrews* also states that a petition to add a misrepresentation issue requires evidence of motive. The Commission there rejected that the slight comparative enhancement for residence in the proposed city of license was not persuasive evidence of motive to misrepresent facts. 86 FCC 2d at 1177. Similarly, the slight comparative enhancement for employment commencing after the filing of Moonbeam's application is not persuasive evidence of intent to misrepresent.

see also Garrett, Andrews, supra, at 1177. Where, as here, accurate information is a matter of public record, such intent "is difficult to find."

CONCLUSION

Simply stated, Willson's petition is both too little and too late. He has presented no good cause for his untimeliness, and no showing of

EXHIBIT A

Before The
Federal Communications Commission
Washington, D.C. 20554

In re Applications Of)	Docket No. MM 93-42
)	
MOONBEAM, INC.)	File No. BPH-911115MG
)	
GARY E. WILLSON)	File No. BPH-911115MO
)	
For a Construction Permit for a)	
New FM Station on Channel)	
265A in Calistoga, California)	

To: The Honorable Edward Luton
Administrative Law Judge

Declaration of Casey Escher

Casey Escher, under penalty of perjury, declares as follows:

1. I make this declaration on the basis of personal knowledge.
2. I am the Broker in charge of the St. Helena office of James Warren & Sons (Realtors), located at 1414 Main Street, St. Helena, California. I have been employed in the foregoing office for several years.
3. Ms. Mary F. Constant, who is a member of the Napa County Association of Realtors, has since February, 1992 been considered an associate realtor of James Warren & Sons, and her realtor's license has been maintained in the St. Helena office of our company.

Executed this 30 day of April, 1993.



Casey Escher

EXHIBIT B

Before The
Federal Communications Commission
Washington, D.C. 20554

In re Applications Of)	Docket No. MM 93-42
)	
MOONBEAM, INC.)	File No. BPH-911115MG
)	
GARY E. WILLSON)	File No. BPH-911115MO
)	
For a Construction Permit for a)	
New FM Station on Channel)	
265A in Calistoga, California)	

To: The Honorable Edward Luton
Administrative Law Judge

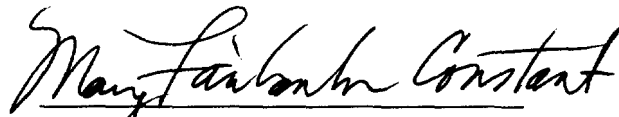
Declaration of Mary Fairbanks Constant

Mary Fairbanks Constant, under penalty of perjury, declares as follows:

1. I make this declaration on the basis of personal knowledge.
2. The mileages and locations stated in my February 27, 1992 Integration Statement and my April 5, 1993 Integration and Diversification Statement were based upon my best knowledge and information at the time they were submitted to the Commission, and I believed them to be correct.
3. Upon review of Mr. Freedman's April 20, 1993 declaration, I readily acknowledge that there might be discrepancies regarding the actual distances of various communities and their subdivisions and their relation to the contours of my proposed station. Such discrepancies, if they exist, were inadvertent, and my representations were made in good faith.

4. Further, even if Sonoma State University is located in Rohnert Park rather than Santa Rosa, the university frequently held classes off-campus at various locations in the local area, including Santa Rosa. I was, in fact, enrolled in such classes while attending Sonoma State.

Executed this 30 day of April, 1993.



Mary Fairbanks Constant

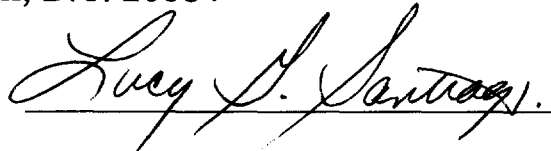
CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing Opposition to Petition to Enlarge was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

A. Wray Fitch, III, Esquire
Gammon & Grange
8280 Greensboro Drive
McLean, VA 22102-3807

Administrative Law Judge Edward Luton
2000 L Street N.W.
Washington, D.C. 20036

Larry Miller, Esquire*
Federal Communications Commission
Mass Media Bureau, Hearing Branch
Suite 7212
2025 M Street N.W.
Washington, D.C. 20554

A handwritten signature in cursive script, reading "Lucy D. Santaghi", is written over a horizontal line.

May 5, 1993